THE SCOTCH WHISKY ASSOCIATION & ANOR.

v.

EWEIN WINERY (M) SDN. BHD.

HIGH COURT, PULAU PINANG
DATO' ABDUL HAMID BIN HAJI MOHAMED J.
[CIVIL SUIT NO. 22-395-89]
9 DECEMBER 1993

PRACTICE & PROCEDURE: Application to strike out statement of claim - Order 18 r. 19 Rules of the High Court 1980 - Whether plaintiffs have a cause of action - Principles applicable in an application to strike out.

The plaintiffs claim that the defendants are damaging the trade, goodwill and interest of members of the first plaintiff, which includes the second plaintiff, by selling or offering to sell in Malaysia spirits which are not Scotch Whisky but labelled in such a way as to suggest that they are whisky distilled and matured in Scotland.

The defendants contended that the first plaintiff are not a distiller, blender or trader in Scotch Whiskies and do not own any get up or trade marks. That being the case the defendants argued that the first plaintiff have no proprietory right and therefore no cause of action for its infringement and sought to strike out the first plaintiff as a party to the suit.

The defendants also sought to strike out the statement of claim of the second plaintiff on the grounds that the second plaintiff was not the registered user or proprietor of the trade marks at the time of commencement of this action.

Held:

[1] In so far as the first plaintiff's are concerned the question whether the plaintiffs have a "pecuniary interest" in the subject matter of the suit cannot be judged merely by reading the pleadings. In fact, reading the statement of claim alone, it does appear that the plaintiffs do have some pecuniary interest in the matter. In any case this is not a plain and obvious case where the plaintiffs do not have a reasonable cause of action. Neither is the action frivolous and vexatious or an abuse of the process of the Court.

[2] The second plaintiff's are a company who carry on business as distillers, blenders and exporters of Scotch Whisky. They clearly have a reasonable cause of action against the defendants whom they allege are passing off their (the defendants') product as Scotch Whisky when it is not. The statement of claim of the second plaintiff is not frivolous, vexatious or an abuse of the process of the Court.

[Defendants' application to strike out statement of claim of first and second plaintiffs dismissed with costs].

Case referred to:
J. Billinger & Ors. v. Costa Brava Wine Co. [1960] 1 Ch. 262 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a)
Companies Act 1948 (UK)

Other sources referred to:
Supreme Court Practice 1988, Vol. I, p. 315

For the plaintiff - S.F. Wong; M/s. Shearn Delamore & Co.
For the defendant - Tan Boon Hee; M/s. Tan, Teh & Co.

JUDGMENT

Abdul Hamid bin Haji Mohamed J:
The first plaintiffs are a company incorporated under the United Kingdom Companies Act 1948 and have their registered office in Scotland. The objects for which they have been established include:

(a) protecting and promoting the interests of the Scotch Whisky trade generally both in Scotland and elsewhere;
(b) to prosecute, defend and enter into legal proceedings in any territory of the world in defence of theinterest of the Scotch Whisky trade.

The first plaintiffs accept and register as members, individuals, companies or firms carrying on business as distillers, blenders and exporters of Scotch Whisky and each member is obliged to pay annual subscriptions to the first plaintiffs.

The second plaintiffs are members of the first plaintiffs and are a company incorporated under the United Kingdom Companies Act 1948 with a registered office in Scotland. They carry on business as distillers, blenders and exporters of Scotch Whisky distilled in Scotland from a mash of cereals in a specific manner.

The second plaintiffs have distilled and blended Scotch Whisky and have extensively advertised,

offered for sale and sold the same under the description "Scotch Whisky". Thus, a person asking for Scotch Whisky in Malaysia or elsewhere would expect it to be distilled in Scotland and nowhere else.

The defendants are a company incorporated in Malaysia with a registered office in Butterworth and carry on the business of processors and bottlers of liquour.

The plaintiffs claim that the defendants are damaging the trade, goodwill and interest of members of the first plaintiffs, including those of the second plaintiffs by selling or offering to sell in Malaysia spirits which are not Scotch Whisky but labelled in such a way as to suggest that they are Scotch Whisky i.e. whisky distilled and matured in Scotland. The plaintiffs' cause of action is for passing-off their spirits which are not distilled and matured in Scotland as Scotch Whiskies i.e. whiskies distilled and matured in Scotland.

A number of reliefs are prayed - see statement of claim, Enclosure l.

By a summons-in-chambers (Enclosure 13) the defendant applies for the orders that the first plaintiffs be struck out as a party and that paragraphs 1, 2 and 8 of the plaintiffs' statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980 (RHC 1980)

By another summons-in-chambers (Enclosure 18) the defendant also applies that the second plaintiffs' statement of claim be struck out under O. 18 r. 19 of the RHC 1980.

Let me deal with the application against the first plaintiff's first (Enclosure 13).

Learned Counsel for the defendant submits that the first plaintiffs have no cause of action which is independent or not dependent on the rights of its members. The first plaintiffs are not a distiller, blender or trader in Scotch Whiskies and do not own any get up or trade marks. That being the case, the plaintiffs have no proprietory right and therefore have no cause of action for its infringement.

Learned Counsel for the plaintiffs makes it clear, as it is clearly stated in their statement of claim that their action is not based on an infringement of any of the plaintiffs' trade marks but for passing-off the defendants' "Seven Seas" whisky as "Scotch Whisky" i.e. whiskies distilled and matured in Scotland.

The question is, whether in the circumstances, the first plaintiffs have a cause of action.

Order 18 r. 19 (2) RHC 1980 makes it clear that where a defendant makes an application under O. 18 r. 19(1)(a) that the statement of claim discloses no reasonable cause of action, no evidence shall be admissible. The Court needs only look at the pleadings.

The principles applicable in considering an application under this paragraph is clear. Suffice for me to quote the learned authors of the **Supreme Court Practice 1988,** Vol. I at p. 315:

> A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleadings are considered ... But the practice is clear. So long as the statement of claim or particulars ... disclose some cause of action, or raise some question fit to be decided by a Judge of a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out ...

I do not think the question whether the plaintiffs have a "pecuniary interest" in the subject matter of the suit in the circumstances can be judged merely by reading the pleadings. Indeed, reading the statement of claim alone, it does appear that the plaintiffs do have some pecuniary interests in the matter. In any case, I do not think that this is a plain and obvious case where the plaintiffs do not have a reasonable cause of action. Neither do I think that the action is frivolous and vexatious or that it is an abuse of the process of the Court.

Defendant's application against the first plaintiffs (Enclosure 13) is dismissed with costs.

Now I turn to Enclosure 18 which is to strike out the second plaintiffs' statement of claim under O. 18 r. 19(a), (b) and (d). Basically the ground relied on by learned Counsel for the defendant is the same as in their application against the first plaintiff i.e. the second plaintiff's have no reasonable cause of action since the second plaintiff's are "not the registered proprietor or user of all those trade marks at the time of commencement of this action."

As stated earlier the cause of action of the second plaintiffs, like the first plaintiffs, is for passing-off, not infringement of a registered trade mark. I find the case of *J. Billinger and Ors. v. Costa Brava Wine Co.* [1960] 1 Ch. 262 of some assistance. In that case the plaintiffs sued

on behalf of themselves and all other persons producing wine in the champagne district of France which was supplied to England and Wales, claiming an injunction restraining the defendants from applying the trade descriptions "champagne" or "Spanish Champagne" to wine made in Spain or from grapes grown in Spain. For the sake of brevity, I only wish to quote paragraph (l) of the head note under "Held":

> 33A (1) that the law of pasing off was not limited in scope as to allow a person competing in trade to attach to his produce a name or description with which it had no natural association, so as to make use of the reputation and goodwill gained by a product genuinely indicated by that name and description, and that it made no difference if the persons truly entitled to describe their goods by that name were a class producing goods in a certain locality and not merely one individual, for the description was part of their goodwill and a right of property. The law would fail if, as a general rule, it could offer no remedy for the deliberate act of one person causing damage to the property of another and it should, and did, provide a remedy for the type of unfair competition alleged in the statement of claim.

The second plaintiffs are a company who carry on business as distillers, blenders and exporters of Scotch Whisky. I am of the view they clearly have a reasonable cause of action against the defendants whom they allege are passing-off their (defendants') product as Scotch Whisky when it is not. I am of the view that the statement of claim of the second plaintiff is not frivolous, vexatious or an abuse of the process of the Court.

The defendants' application (Enclosure 18) is also dismissed with costs.

WENG WAH CONSTRUCTION CO. SDN. BHD.

v.

YIK FOONG DEVELOPMENT SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[COMPANIES WINDING-UP NO. D5-28-300-90]
7 APRIL 1994

COMPANY LAW: Section 218(2)(a) Companies Act 1965 - Winding-up petition - Preliminary objections - Respondent contending under s. 218(2)(a) proper service by leaving petition at respondent's registered office - Petition served by registered post - Whether non-compliance with statutory mode of service - Contention that petitioner digressed from s. 218(2)(a) to s. 218(2)(c) - Whether permissible - Respondent claiming to have recovered from recession - Proposal made to settle debt - Whether proposal bona fide - Whether respondent able to meet liabilities - Whether in the interest of the parties to wind-up respondent.

STATUTORY INTERPRETATION: Companies Act 1965 - Section 218(2) - Whether word "or" in paragraghs (a), (b) & (c) in sub-section (2) disjunctive or conjunctive - Effect of word.

The petition was taken out against the respondent pursuant to a judgment obtained on 22 May 1986 for RM2,284,627.94 together with interest and costs which as at 1 October 1993 had accumulated to RM4,997,623.61. The respondent was also indebted to the Director-General of Inland Revenue and Perunding Aziz Sehu Sdn Bhd and had charged all its movable property to two opposing creditors.

In opposing the petition learned Counsel for the respondent raised preliminary objections, firstly, that the petitioner was relying solely on s. 218(2)(a) of the Companies Act 1965 (the Act) in which case the proper mode of service was by leaving it at the respondent's registered office. Section 350 of the Act provided for service by way of registered post which was the mode taken by the petitioner in this case. The respondent claimed that as there was non-compliance with the statutory mode of service, there was no statutory presumption of insolvency. Secondly, the respondent contended that the petitioner had digressed from s. 218(2)(a) to